

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FS:MAN:POSTF-157876-01

RLPeacock

DATE

TO Henry Singleton, Territory Manager
Large and Mid-Size Business Division (Financial Services)
Attn: Bonnie Mui, Revenue Agent

FROM Area Counsel (Financial Services) (Area 1: Manhattan)

SUBJECT

Taxable years ending [REDACTED] and [REDACTED]

STATUTE OF LIMITATIONS EXPIRES: [REDACTED]

UIL Nos. 1502.77-01
6501.08-00
6501.08-08
6501.08-09

DISCLOSURE STATEMENT

This advice may constitute return information subject to I.R.C. § 6103. This advice may contain confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination, Appeals, or Counsel recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or Counsel or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the Field Office with jurisdiction over the case.

INTRODUCTION

This memorandum is in response to your request for advice in the above-captioned matter. Specifically, you have asked our office to determine which entity is the proper entity to execute a Form 872 (Consent to Extend the Time to Assess Income Taxes) ("Form 872") for [REDACTED] and its consolidated subsidiaries (" [REDACTED] ") for the taxable years ending [REDACTED], and [REDACTED].

ISSUES

1. Which entity is the proper entity to execute a Form 872 for [REDACTED] and its subsidiaries for the taxable years ending [REDACTED] and [REDACTED]?
2. Who is authorized to sign the Form 872 for [REDACTED] and its subsidiaries for the taxable years ending [REDACTED] and [REDACTED]?

BACKGROUND

This opinion is based upon the facts set forth herein. It may change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon. You should be aware that, under routing procedures which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office, which should be in approximately 10 days. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

[REDACTED] (EIN [REDACTED]), a New York corporation, is the common parent of an affiliated group of corporations. It filed consolidated U.S. Corporate Income Tax Returns (Forms 1120) with its affiliates for the taxable years ending [REDACTED] and [REDACTED].

On [REDACTED], [REDACTED], together with several of its direct and indirect subsidiaries, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the [REDACTED] of New York (Case No. [REDACTED]). On [REDACTED], the Bankruptcy Court entered an Order confirming the [REDACTED] of [REDACTED] and [REDACTED].

Affiliates Under Chapter 11 of the Bankruptcy Code, dated [REDACTED] (the "Plan").

In accordance with the Plan, [REDACTED] established a liquidating trust, known as the [REDACTED] (the "Liquidating Trust") to liquidate its assets. [REDACTED] (" [REDACTED] ") was appointed as the trustee of the Liquidating Trust. [REDACTED] also established the [REDACTED] (the "Disputed Claims Trust") to wind up [REDACTED]'s affairs and to ultimately dissolve [REDACTED].

According to a status report filed by [REDACTED] with the Bankruptcy Court on [REDACTED], the Liquidating Trust is currently in the process of liquidating the assets of [REDACTED], pursuant to the Plan.

To date, [REDACTED] has not filed a Certificate of Dissolution with the Secretary of the State of New York. The revenue agent has indicated, however, that the officers of [REDACTED] are no longer available to sign a consent on behalf of the corporation. The revenue agent has also advised our office that the Liquidating Trust will file the final corporate tax return on behalf of [REDACTED].

For purposes of this memorandum, our office assumes that neither [REDACTED], nor the members of the consolidated group, have notified the Service of its designation of another member to act as the agent for the consolidated group, pursuant to Treas. Reg. § 1.1502-77(d).

DISCUSSION

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 121.2.22.3 requires use of Letter 907(DO) to solicit the extension, and IRM 121.2.22.4.2 requires use of Letter 929(DO) to return the signed extension to the taxpayer. The AIMS/Processing Handbook (IRM 104.3) provides the procedures for processing consents to extend the statute of limitations on assessment. IRM 104.3.30.11.3 discusses the preparation of Form 895 and Form 5348 when a consent to extend the statute is received by the Service. Please note that dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it. The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

We further note that according to section 3461(b)(2) of the Restructuring and Reform Act of 1998 (codified at I.R.C. § 6501(c)(4)(B)), you must advise the taxpayer of its right to refuse to extend the statute of limitations or, alternatively, to limit an extension to particular issues or specific periods of time. We suggest using Publication 1035 when soliciting the Form 872 to satisfy this requirement, or advising the taxpayer orally or by other writing. In any event, please be sure to document your actions in the case file.

Issue 1

The first issue is which entity is the proper entity to execute a Form 872 for [REDACTED] and its subsidiaries for the taxable years ending [REDACTED] and [REDACTED].

Generally, a common parent of a consolidated group is "the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year." Treas. Reg. § 1.1502-77(a). This grant of authority permits the common parent of a consolidated group to sign Forms 872 on behalf of its subsidiaries. Treas. Reg. § 1.1502-77(c) provides that, unless otherwise agreed, a common parent's waiver of the statute of limitations shall bind each corporation that was a member of the group during the taxable year.

The common parent remains the sole agent of the group authorized to execute Forms 872 even if the parent has filed for bankruptcy. See J&S Carburetor Co. v. Commissioner, 93 T.C. 166 (1989). In J&S Carburetor, certain subsidiaries filed a petition with the Tax Court after the common parent filed for bankruptcy. J&S Carburetor, 93 T.C. at 167. Pursuant to 11 U.S.C. § 362(a)(8), the parent was prohibited from filing a petition with the Tax Court until the conclusion of the bankruptcy proceedings, or until the bankruptcy judge lifted the stay. Id. at 168. The Tax Court held that it did not have jurisdiction over the case, explaining,

Section 1.1502-77(a) ... makes no mention of the bankruptcy of the common parent corporation. ... Having elected the benefits associated with filing a consolidated return, petitioners are subject to the attendant burdens. We, therefore, decline petitioners' invitation to create an exception to the longstanding sole agency rule.

Id. at 169 (footnote omitted).

Because [REDACTED]'s bankruptcy case is ongoing, and because [REDACTED] remains in existence, [REDACTED] remains the sole agent of the consolidated group authorized to sign a Form 872 on its own behalf and on behalf of its subsidiaries for the taxable years ending [REDACTED], and [REDACTED].

Accordingly, the caption on the Form 872 should read, "[REDACTED]" The EIN of [REDACTED] ([REDACTED]) should be inserted on the upper right hand corner of the Form 872. In addition, at the bottom of the first page of the Form 872, you should include the following language:

This is with respect to the consolidated income tax liability of [REDACTED] (EIN [REDACTED]) and affiliated subsidiaries consolidated group for the taxable years ending [REDACTED], and [REDACTED].

Issue 2

The second issue is who should sign the Form 872 for [REDACTED] and its subsidiaries for the taxable years ending [REDACTED] and [REDACTED].

The regulations of section 6501(c)(4) do not specify who may sign consents to extend the statute of limitations. Accordingly, the rules applicable to the execution of an original return have been deemed to apply to the execution of a consent to extend the time to make an assessment. See Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. In the case of a corporate return, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Therefore, these same officers have the authority to sign Forms 872.

Here, however, the revenue agent has indicated that the corporate officers are no longer available to sign the consent on behalf of the group. Instead, in accordance with the Plan confirmed in the Chapter 11 bankruptcy proceeding, [REDACTED] has been appointed as the trustee of the Liquidating Trust, the entity undertaking the disposition of [REDACTED]'s assets.

A fiduciary who has notified the Service of a fiduciary relationship under I.R.C. §§ 6903 and 6036 assumes the powers, rights, duties, and privileges of the corporation. Under Treas. Reg. § 301.6036-1(a)(1), however, "a bankruptcy trustee, debtor

in possession or other like fiduciary in a bankruptcy proceeding is not required ... to give notice of appointment, qualification or authorization to act to the Secretary or his delegate." Thus, [REDACTED], as the Chapter 11 trustee for [REDACTED], may execute the Form 872 on behalf of the consolidated group.

If you have any questions, or need additional information, please contact Robin L. Peacock at (212) 436-1335.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

ROLAND BARRAL
Area Counsel, LMSB
(Financial Services)

By: _____

PETER J. LABELLE
Associate Area Counsel